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No. 95-1439

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOAN M. LAKOSKI, PETITIONER

v.

UNIVERSITY OF TEXAS MEDICAL BRANCH AT GALVESTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WALTER DELLINGER
Acting Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
DENNIS J. DIMSEY
MARIE K. MCELDERRY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

21 pp

QUESTION PRESENTED

Whether a private suit for damages for employment discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, is precluded by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner, Dr. Joan M. Lakoski, a female university professor, brought this suit against the University of Texas Medical Branch at Galveston (respondent) and certain university officials, alleging that they had intentionally discriminated against her on the basis of sex when they denied her tenure, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, 42 U.S.C. 1983, and state tort law. The district court denied respondent's request that the case be dismissed on

the ground that there was no implied private right of action under Title IX for employment discrimination. Pet. App. 3b.[1] The case proceeded to trial, the jury returned a verdict and damages award for petitioner, and, after ordering petitioner to remit a portion of the damages, the district court entered judgment for petitioner. *Id.* at 1a-2a. The court of appeals reversed and rendered judgment for respondent. *Id.* at 1b-17b.

1. Petitioner joined respondent's faculty in 1984 as a tenure-track assistant professor in the Department of Pharmacology. Pet. App. 2b. She sought and was denied promotion three different times, once each in 1988, 1989, and 1990. *Ibid.* In 1991, the department's tenure committee recommended that petitioner not be considered for tenure in the future. *Ibid.* Respondent offered petitioner another position with a higher salary, which she rejected. *Ibid.* Petitioner was later informed by the department chairman that her 1991-1992 appointment would be her last at respondent University. *Ibid.*

Petitioner filed suit against respondent and three university officials. She alleged that the denial of tenure and her termination constituted intentional sex discrimination in violation of Title IX, as well as 42 U.S.C. 1983 and state tort law; she sought reinstatement and compensatory and punitive damages. Pet. App. 3b; Resp. C.A. Br. 4. In conjunction with her complaint, petitioner requested that respondent be preliminarily enjoined from terminating her. Pet. App. 3b. Respondent agreed to

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[1] Because the documents in the petition appendix are each paginated separately, we cite the pages of the first document followed by an "a", the pages of the second document followed by a "b," and the pages of the third document followed by a "c."

retain petitioner on its faculty pending the outcome of the trial. *Ibid.*[2]

Respondent filed a motion to dismiss, arguing, *inter alia*, that there is no implied private right of action under Title IX for damages for employment discrimination. Pet. App. 3b. Adopting the recommendation of a magistrate judge, the district court denied the motion to dismiss on that ground. *Ibid.*[3] The case proceeded to trial and the jury returned a verdict for petitioner and awarded her $250,000 in damages. *Id.* at 4b.[4] The district court ordered petitioner to remit a portion of the damages award, entered a judgment of $150,000, and awarded attorneys' fees. *Ibid.*

2. The court of appeals reversed. Pet. App. 1b-17b. The court rendered judgment for respondent on petitioner's Title IX claim, holding that Title VII of the Civil

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[2] Petitioner initially joined with another female faculty member in filing suit, but she later proceeded on her own. Pet. 2. Petitioner ultimately accepted a tenure-track position at Pennsylvania State University. Pet. App. 3b.

[3] The court dismissed the Section 1983 claims, to the extent they could be construed as having been brought against respondent, based on the State's Eleventh Amendment immunity. Pet. App. 3b. With regard to the individual defendants, the district court denied their motion to dismiss based on qualified immunity, *ibid.*, but, at the close of petitioner's case at trial, the district court dismissed all the claims against the individual defendants. *Id.* at 4b.

[4] The court of appeals explained that two claims were submitted to the jury as a joint claim—the Title IX claim as well as a Section 1983 claim based upon Title IX. Pet. App. 4b. As the court of appeals notes, the nature of the Section 1983 claim submitted is not entirely clear because the district court earlier had dismissed the Section 1983 claims against respondent (see note 3, *supra*), although without distinguishing between a Section 1983 claim based upon the Fourteenth Amendment and a Section 1983 claim based upon Title IX. See Pet. App. 3b-4b.

Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, "provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions." Pet. App. 5b. The court noted that petitioner had a colorable claim of employment discrimination in violation of Title VII, but had not pursued that claim and had not filed a charge with the Equal Employment Opportunity Commission as required prior to bringing a Title VII court action. *Id.* at 3b. The court concluded that permitting an implied private right of action for damages under Title IX for employment discrimination would disrupt the remedial scheme for redressing employment discrimination by educational institutions, *id.* at 6b, and that Congress did not intend that Title IX "offer a bypass of the remedial process of Title VII," *id.* at 5b.[5]

a. The court rejected petitioner's claim that this Court's rulings in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982), and *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), compel a conclusion that there is an implied right of action under Title IX for money damages in a private employment discrimination suit against an educational institution receiving federal funds. The court purported to distinguish *Cannon* and *Franklin* because they involved suits by students rather than by employees, and *North Haven* because that case arose out of a challenge to administrative regulations rather than a claim by an individual for money damages. Pet. App. 6b.

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[5] The court stated that its holding is limited to "individuals seeking money damages under Title IX directly or derivatively through § 1983 for employment practices for which Title VII provides a remedy," and expressed no opinion on whether Title VII "excludes suits seeking only declaratory or injunctive relief." Pet. App. 5b.

b. The court of appeals also held that, to the extent the record indicated that the district court had submitted to the jury a Section 1983 action against respondent based on Title IX (see note 4, *supra*), the district court erred. Pet. App. 7b. The court held that Congress intended that Title VII's comprehensive remedial scheme "exclude a damage remedy under Title IX for individuals alleging employment discrimination," *id.* at 9b, both directly under Title IX and indirectly through Section 1983. See Pet. App. 8b-17b, relying on *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981).

The court of appeals viewed the instant case as comparable to *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 378 (1979), where the Court held that a violation of Title VII could not be pursued through 42 U.S.C. 1985(e) because such a suit would bypass the Title VII administrative process. Pet. App. 9b. The court also relied on *Brown* v. *General Services Admin.*, 425 U.S. 820, 835 (1976), in which the Court held that Title VII provides the exclusive judicial remedy for federal employees' employment discrimination claims. Pet. App. 9b. Based on these decisions, the court of appeals earlier had held that a Title VII claim could not be the basis for an action under Section 1983. Pet. App. 9b-10b, citing *Irby* v. *Sullivan*, 737 F.2d 1418, 1428 (5th Cir. 1984); *Johnston* v. *Harris County Flood Control Dist.*, 869 F.2d 1565, 1574 (5th Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

The court of appeals recognized that, according to the House Report accompanying the 1972 amendment to extend Title VII to state and local government employees, Title VII was not intended to preempt Section 1983 claims. Rather, Title VII "was envisioned as an independent statutory authority meant to provide an ag-

grieved individual with an additional remedy to redress employment discrimination." Pet. App. 10b. The court concluded that this statement did not have any relevance to Title IX remedies, however, because the House Report also stated that Title VII was not meant to affect "*existing* rights that [state and local government employees] have already been granted by previous legislation" (emphasis added), and Title IX did not yet *exist* at the time of that Title VII amendment. *Id.* at 11b-12b. The court reasoned that when Congress enacted Title IX a few months later, it did not intend to create a bypass of Title VII administrative procedures. *Id.* at 12b.

The court of appeals concluded that the legislative history of Title IX demonstrated that the right to be free from sex discrimination created by Title IX is "no different from the Title VII right." Pet. App. 13b. The court pointed out that Title VII originally exempted educational institutions from its coverage and that, as initially introduced, the bill that later included Title IX also contained a provision to amend Title VII to remove that exemption. *Ibid.*, citing H.R. 7248, 92d Cong., 1st Sess. § 1006 (1971). Congress, however, removed the Title VII exemption before enactment of Title IX and the final bill that included Title IX omitted the provision amending Title VII. Pet. App. 14b. The court of appeals reasoned that this reflected a congressional intent to create one right and two remedies for employment discrimination, *i.e.*, a remedy for individuals through Title VII and a remedy for federal funding agencies through Title IX. *Id.* at 14b-15b.[6] The court concluded that "[g]iven this

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[6] The court read Title IX administrative regulations and case law to support its interpretation that the prohibitions against sex discrimination in Title IX and Title VII are the same because the regulations and case law direct agencies and courts to look to Title VII law when

compelling evidence that Title IX prohibits the same employment practices proscribed by Title VII, we hold that individuals seeking money damages for employment discrimination on the basis of sex in federally funded educational institutions may not assert Title IX either directly or derivatively through § 1983." *Id.* at 16b-17b.[7]

DISCUSSION

1. a. The decision of the court of appeals is incorrect[8] and conflicts with this Court's decisions regarding liability and remedies under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibits sex discrimination by educational institutions that receive federal financial assistance. According to the court of appeals, if a person who has been subjected to employment discrimination in violation of Title IX could have brought an action for employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, that person is precluded from filing a private cause of action for damages under Title IX.

That ruling cannot be reconciled with the rationale underlying the Court's decision in *Franklin* v. *Gwinnett*

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deciding whether a Title IX violation has occurred. Pet. App. 15b-16b. The court discounted administrative regulations that state that the obligations imposed by Title IX are "independent of, and do not alter" obligations not to discriminate under Title VII because, in the court's view, that statement is merely an indication that an administrative finding of discrimination under Title VII is not a prerequisite to such a finding under Title IX. *Id.* at 15b n.4.

[7] The court of appeals dismissed as moot petitioner's cross-appeal concerning the remittitur of damages and the attorneys' fees award. Pet. App. 2b, 17b. The court denied a petition for rehearing and a suggestion for rehearing en banc. *Id.* at 1c-2c.

[8] Petitioner has not sought this Court's review of any question regarding Section 1983, and this brief does not analyze the court of appeals' rulings on that issue. See Pet. i, 3-10.

County Public Schs, 503 U.S. 60, 76 (1992), and the Court's antecedent decisions in *Cannon* v. *University of Chicago*, 441 U.S. 677, 703 (1979), and *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 531 (1982). In *Cannon*, the Court held that individuals can bring private causes of action against educational institutions to remedy sex discrimination in violation of Title IX. In *North Haven*, the Court held that claims of employment discrimination based on sex are cognizable under Title IX. In *Franklin*, the Court held that damages are available in private causes of action under Title IX to redress intentional violations of the statute. Petitioner is correct (Pet. 3-4) that these rulings lead inexorably to the conclusion that an employee who is a victim of intentional discrimination based upon sex by a federally funded education program or activity has a private right of action to seek damages under Title IX, *i.e.*, employees are among the persons protected by Title IX (*North Haven*) who have a private right of action (*Cannon*) that includes a damages remedy for intentional discrimination (*Franklin*).

Without any analysis of the reasoning underlying those opinions, however, the court of appeals rejected that conclusion and held, in essence, that the damages remedy recognized in *Franklin* is limited to cases in which the Title IX plaintiff is a student. But, this Court implied no such limitation in *Franklin*—quite the opposite.

In *Franklin*, the Court applied the "longstanding rule" that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." 503 U.S. at 66, 70-71. The Court found that "the same contextual approach" toward determining congressional intent that was used by the Court in *Cannon* "to justify an implied right of action more than amply demonstrates the lack of any legislative

intent to abandon the traditional presumption in favor of all available remedies." *Id.* at 72. After reviewing subsequent legislative developments, the Court concluded that it could not say "that Congress has limited the remedies available to a complainant in a suit brought under Title IX." *Id.* at 73.[9]

Nothing in *Franklin* supports a different conclusion with regard to damages for one subgroup of Title IX plaintiffs—employment discrimination victims. To the contrary, the Court's reasoning in *Franklin* strongly suggests that employment cases are no different in this respect from the student's case that was before it. First, the Court expressly relied on *Guardians Ass'n* v. *Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983), to support its application of the traditional presumption that a federal court may order any appropriate relief where Congress is silent on the question of remedies. The Court pointed out that, in *Guardians*, "a clear majority [of the Court] expressed the view that damages were available under Title VI [of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*] in an action seeking remedies for an intentional violation" of that statute. 503 U.S. at 70. *Guardians* involved an employment discrimination claim brought through an implied cause of action under the statute upon which Title IX

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[9] The *Franklin* Court concluded that Congress's subsequent amendment to Title IX to abrogate the States' Eleventh Amendment immunity against legal and equitable remedies, see Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. 2000d-7, validated the award of damages under Title IX, as did enactment of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), which again expanded the scope of Title IX without any effort to restrict the cause of action recognized in *Cannon* or to alter the traditional presumption in favor of all appropriate relief. 503 U.S. at 72-73.

was patterned, Title VI.[10] Because of the similarities between Title VI and Title IX, it is apparent that "Congress intended similar remedies to be available under Title IX." *Guardians*, 463 U.S. at 594 (opinion of White, J., joined by then-Justice Rehnquist).[11] Thus, in light of *Guardians*, damages for employment cases should be available under Title IX as they are under Title VI.

Second, the *Franklin* Court expressly addressed, and rejected, the argument that Title IX remedies should be limited to backpay and prospective relief. The Court noted that the adequacy of legal remedies should first be determined before resorting to equitable remedies. See 503 U.S. at 75-76. If, as the court of appeals here reasoned, employment complaints seeking damages were not covered by the ruling in *Franklin*, the question of the availability of backpay as a remedy would have been irrelevant. See *id.* at 76 (Court recognized that in *Franklin*, itself, the question of the availability of backpay was irrelevant because plaintiff was a student).

The Court's opinion in *North Haven* also evidences that the Court already has considered, and rejected, the

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[10] Title VI prohibits discrimination based on race, color, or national origin, and applies not only to educational institutions that receive federal funds, but to all programs or activities receiving federal financial assistance. 42 U.S.C. 2000d. With regard to employment discrimination, however, Title VI applies only "where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. 2000d-3. Congress rejected a proposed amendment that would have limited Title IX in a similar manner. See page 13, *infra*.

[11] Determination of what remedies are available under Title VI also determines what remedies are available under Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination based on handicap by any program or activity that receives federal financial assistance. See 29 U.S.C. 794a and 794a(a)(2) (making available to Section 504 plaintiffs the "remedies, procedures, and rights set forth in title VI").

essence of the reasoning of the court of appeals below. The Court expressly rejected the contention that the availability of other adequate remedies to redress employment discrimination affects the availability of remedies under Title IX. *North Haven*, 456 U.S. at 535 n.26. The Court explained that "even if alternative remedies are available and their existence is relevant, this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination." *Ibid.*, citing *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 236-239 (1976) (availability of Title VII remedy does not preclude grievance procedure under a collective bargaining agreement); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975) (availability of Title VII remedy does not preclude action under 42 U.S.C. 1981); and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47-49 (1974) (availability of contractual rights under a collective bargaining agreement does not preclude Title VII remedy).[12]

The *North Haven* Court also analyzed the same legislative history relied upon by the court of appeals below (see Pet. App. 13b-15b), regarding enactment of Title IX. The *North Haven* Court gave no indication that it viewed Title IX, as the court of appeals did, as merely a means "to bolster the enforcement of the pre-existing Title VII prohibition of sex discrimination in federally funded educational institutions" (Pet. App. 15b). See 456

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[12] In *Cannon*, the Court already had indicated that individual actions were authorized under Title IX to remedy employment discrimination. See *Cannon*, 441 U.S. at 708 n.42 (discussing, *inter alia*, fact that private causes of action would be effective in areas where administrative resources were lacking and noting that most administrative "complaints involv[ed] sex discrimination in higher education academic employment").

U.S. at 523-531. To the contrary, the Court discussed, in detail, the circumstances surrounding the Senate floor amendment that added Title IX, *inter alia*, to the legislation. The *North Haven* Court emphasized that Title IX's Senate sponsor described Title IX as the "*heart*" of his amendment and clearly intended that "employees as well as students be protected" by that provision, without any suggestion that employees would have to seek relief via different means than students. *Id.* at 524, 525.

In addition, like the court below, the *North Haven* Court noted that the amendment also initially included a provision to remove from Title VII the exemption for schools and educational employees, but ultimately omitted that provision because of the intervening enactment of such an amendment to Title VII through other legislation. 456 U.S. at 524-530 & n.18; see Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103, amending 42 U.S.C. 2000e(a).[13] The Court did not, however, give any indication that it viewed the matter, as the court of appeals did (Pet. App. 14b), as evidencing that Congress enacted Title IX simply to provide a second remedy for a Title VII violation. Rather, the Court expressly concluded that Title IX, "as well as the Title VII * * * provisions, was aimed at discrimination in employment." *North Haven*, 456 U.S. at 524. The Court also quoted the sponsor's statement that Title IX dealt with discrimination in admission, services, and "employment, * * * as a member of a faculty or whatever" and that, "[i]n the area of employment, we

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[13] The legislative history of the Equal Employment Opportunity Act of 1972 provides additional evidence that Congress did not intend Title VII to preempt Title IX actions by employees. Cf. *Keller* v. *Prince George's County*, 827 F.2d 952, 958-961 (4th Cir. 1987); *Beardsley* v. *Webb*, 30 F.3d 524, 526-527 (4th Cir. 1994).

permit no exceptions." *Id.* at 526, quoting 118 Cong. Rec. 5812 (1972) (emphasis omitted).

Finally, the *North Haven* Court discussed the House bill, cited by the court below (Pet. App. 13b-14b), and explained that it contained a provision that would have limited the ability of funding agencies to take action under Title IX, with regard to an employment practice of a recipient, to cases "where a primary objective of the Federal financial assistance is to provide employment." 456 U.S. at 527. The Court pointed out that, in the conference committee, however, the House receded, and Title IX was enacted without the restriction. *Id.* at 528. Thus, the Court made clear that, although Congress was specifically presented with an opportunity to adjust Title IX to eliminate, or even limit, its overlap with Title VII, Congress chose not to do so.[14]

There is thus no valid basis for the court of appeals' interpretation of the legislative history of Title IX as evidencing a congressional intent to treat victims of discrimination under Title IX differently depending on whether they are employees or students, or to require employees seeking redress for violations of Title IX to pursue different avenues for relief than students. And, in any event, the legislative history cannot possibly be read to evidence a congressional intent that employees who seek damages under Title IX must proceed under Title VII to obtain such a remedy because, at that time, Title VII did not authorize damages. It was not until 19 years later that Congress enacted the Civil Rights Act of 1991

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[14] See also *North Haven*, 456 U.S. at 530-535 (discussing postenactment history of Title IX, including administrative regulations that were reviewed and not disapproved by Congress that support same interpretation, as well as legislative proposals to limit applicability of Title IX with regard to employment which were not enacted).

that authorizes awards of compensatory and punitive damages in certain Title VII cases involving intentional discrimination. See Civil Rights Act of 1991, Pub. L. No. 166, § 102, 105 Stat. 1072; 42 U.S.C. 1981a.[15]

b. Although respondent asserts (Br. in Opp. 9-11) that no other court of appeals' ruling is "directly" contrary to the holding below, other courts of appeals have recognized that Title VII does not preempt Title IX remedies.[16] Respondent concedes that the Fourth Circuit, in *Preston* v. *Commonwealth of Virginia ex rel. New River Community College*, 31 F.3d 203, 205-206 & n.1. (1994), held that "Title IX's 'implied right [of action] extends to employment discrimination on the basis of gender by education institutions receiving federal funds,'" and that it was even apparent from the opinion that the court's view was that an employment discrimination victim's right under Title IX included damages. Resp. Br. in Opp. 10, quoting *Preston*, 31 F.2d at 206. The First Circuit, in *Lipsett* v. *University of Puerto Rico*, 864 F.2d 881 (1988), similarly indicated that it does not view Title IX remedies in employment discrimination cases to be precluded by Title VII. Specifically, the court held that a

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[15] The Civil Rights Act of 1991 also illustrates that, when Congress intends to preempt the award of damages under one statute by another statute, it does so expressly. In authorizing the award of damages under Title VII in certain cases, Congress expressly stated that such an award is available "provided that the complaining party cannot recover under section 1981 of this title." 42 U.S.C. 1981a(a)(1).

[16] Earlier opinions of the Fifth Circuit, in fact, appeared to assume that Title VII did not preempt Title IX employment discrimination suits. See, *e.g.*, *Chance* v. *Rice Univ.*, 984 F.2d 151 (1993), supplemented on reh'g, 989 F.2d 179 (1993) (affirming, on the merits, a verdict against a Title IX employment discrimination plaintiff, applying both Title VI and Title VII substantive standards, without mentioning any preclusive effect of Title VII).

medical resident had presented sufficient facts to survive summary judgment on her Title IX claim alleging that she had been subjected to sex discrimination in a medical school's surgery residence program. Although the court did not address the question of damages, it indicated that the plaintiff would be entitled to the same remedies under her implied cause of action as other Title IX plaintiffs. The *Lipsett* court expressly held that the Title VII standard for proving discrimination "should apply to claims of sex discrimination arising under Title IX * * * [in] the context of employment discrimination," including the "mixed employment-training context" before it. *Id.* at 897.[17]

The court of appeals cited only one district court case in support of its ruling. Pet. App. 7b n.1, citing *Howard*

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[17] Cf. *Mabry* v. *State Board of Community Colleges & Occupational Educ.*, 813 F.2d 311, 314 n.4 (10th Cir.) (holding Title IX action for employment-related damages barred by the collateral estoppel effect of an earlier Title VII judgment, but noting that it did not reach question whether Title VII preempts Title IX claims), cert. denied, 484 U.S. 849 (1987); *O'Connor* v. *Peru State College*, 781 F.2d 632, 639-643 & n.8 (8th Cir. 1986) (recognizing cause of action under Title IX for employment discrimination and discriminatory employment conditions apart from cause of action under Title VII, but rejecting claims on merits in light of earlier Title VII decision in favor of defendant and because Title IX coverage did not extend to plaintiff's program).

The Seventh Circuit recently took yet a different tack. It held that Title IX provides a private right of action and extensive remedies, including damages, to employment discrimination victims. *Waid* v. *Merrill Area Pub. Schs.*, 91 F.3d 857, 861-863 (1996). The court also held, however, that Title IX preempted the plaintiff's claims under Section 1983, *id.* at 863, that any of her claims for equitable relief under either of those statutes was preempted by Title VII (pre-1991 version), *id.* at 862, and that the plaintiff's successful pursuit of her claim under state law in administrative proceedings "effectively satisfied any claims she might have had under Title VII," *ibid.* The plaintiff's Title IX claim for damages was remanded for further proceedings. *Id.* at 867.

v. *Board of Educ. of Sycamore Community Unit Sch. Dist. No. 427*, 893 F. Supp. 808, 815 (N.D. Ill. 1995). In fact, there is disagreement in the district courts on the issue. In *Howard*, the court held that a Title IX cause of action based on sex discrimination that seeks remedies afforded by Title VII is precluded by Title VII. 893 F. Supp. at 815. The *Howard* court followed the rulings by two other district courts, one that is also in the Seventh Circuit and the other in the Sixth Circuit. *I.e.*, *Storey* v. *Board of Regents*, 604 F. Supp. 1200 (W.D. Wis. 1985) (same); *Wedding* v. *University of Toledo*, 862 F. Supp. 201 (N.D. Ohio 1994) (same). The latter case was recently overruled by the Sixth Circuit, however, in an unpublished decision, *Ivan* v. *Kent State Univ.*, 92 F.3d 1185 (Table), 1996 WL 422496, *2 n.10 (July 26, 1996) (in ruling that Title VII standards should be applied for determining claims of gender discrimination in employment under Title IX, court expressly "overrules the conclusion reached by the district court in *Wedding* * * * that Title VII preempts an individual's private remedy under Title IX"). Other district courts have held (correctly in our view) that "a private right of action for employment discrimination exists under Title IX separate and apart from Title VII and without regard to the availability of the Title VII remedy." *Henschke* v. *New York Hospital-Cornell Medical Ctr.*, 821 F.Supp. 166, 172 (S.D.N.Y. 1993) (relying on *Cannon*, *North Haven*, and *Franklin*, and legislative history, and concluding that "the Supreme Court and Second Circuit interpretations of the statute do not permit" a contrary conclusion); see also *Haynes* v. *Glen Mills Schs.*, 59 Fair Empl. Prac. Cas. (BNA) 566 (E.D. Pa. 1992) (relying on *North Haven* and *Franklin* and also pointing out that, prior to 1991, remedies available under the two statutes were different); *Broussard* v. *Board of Trustees for State Col-*

leges & Universities, 61 Fair Empl. Prac. Cas. (BNA) 710 (E.D. La. 1993) (distinguishing *Storey* as having been decided before the express abrogation of the States' Eleventh Amendment immunity under Title IX and the Court's decision in *Franklin* in which the Court gave no indication that employment claims were to be treated differently from claims by students for purposes of remedies under Title IX).

2. The court of appeals' reliance on *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 378 (1979), and *Brown* v. *General Services Admin.*, 425 U.S. 820, 835 (1976), is misplaced.

In *Novotny*, the Court held that deprivation of a right created by Title VII cannot be the basis for a cause of action under 42 U.S.C. 1985(3).[18] The Court explained that "Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Novotny*, 442 U.S. at 372. Therefore, the only substantive statutory right asserted by the plaintiff in *Novotny* was his right under Title VII and, in light of the administrative process and limitations on remedies Congress established in Title VII, the Court held that such a right could be enforced only through a cause of action under Title VII. The Court explained that its ruling was not inconsistent with *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), in which the Court had held that Title VII did not preclude a separate cause of action to enforce substantive rights created by Section 1981. The Court pointed to similar cases, in which it had held that substantive rights that were

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[18] Section 1985(3) provides a cause of action for damages to persons who are injured as a result of a conspiracy to deprive them of equal protection of, or equal privileges and immunities under, the law. See 42 U.S.C. 1985(3).

conferred by earlier civil rights statutes were not withdrawn by the subsequent passage of modern civil rights laws, and emphasized that *Johnson* and the other cases presented a different issue because they involved two "independent" rights, whereas *Novotny* involved only a Title VII right. *Novotny*, 442 U.S. at 377-378.

Petitioner's case is controlled by *Johnson* and similar cases involving two independent rights, not by *Novotny*. Petitioner's Title IX cause of action seeks to enforce petitioner's right under Title IX, not her right under Title VII. The Court made clear in *Cannon* that "Title IX explicitly confers a benefit on persons discriminated against on the basis of sex" by federally funded education programs. 441 U.S. at 694. Petitioner's claim alleging employment discrimination by respondent, as proven at trial, establishes that she is such a person. *North Haven*, 456 U.S. at 520-530. Petitioner's deprivation of a right created by Title IX was a proper basis for a cause of action for damages directly under Title IX. *Cannon*, 441 U.S. at 717.

The court of appeals' reliance on *Brown* should be rejected on similar grounds. In *Brown*, the Court held that the provision added to Title VII in 1972, establishing the right of federal employees to file a statutory suit for employment discrimination (42 U.S.C. 2000e-16), was intended by Congress to constitute the exclusive judicial remedy against the federal government for employment discrimination. *Brown*, 425 U.S. at 835. The Court concluded that Congress had enacted the legislation because there was no other effective judicial remedy for federal employees, in part because such employees could not overcome the federal government's sovereign immunity defense against such claims. *Id.* at 825-828. The Court found that the "unambiguous congressional perception seems to indicate that congressional intent in 1972 was to

create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Id.* at 828-829. The structure of the 1972 amendment, which established a special administrative and judicial enforcement system for federal employees that involved the Civil Service Commission, confirmed the Court's conclusion. *Id.* at 829-832 & n.11. The Court distinguished its ruling in *Johnson*, *supra*, that Title VII did not preclude a Section 1981 suit, because the *Johnson* case involved *private* employment and it relied on a congressional intent to preserve two causes of action, whereas the congressional intent with regard to federal employees was to create one exclusive remedial scheme. *Brown*, 425 U.S. at 833.

Again, petitioner's case is controlled by *Johnson*, not by *Brown*. Petitioner's case does not involve the unique circumstances presented by federal sovereign immunity and, as discussed above, the legislative history of both Title IX and Title VII support the conclusion that Congress did not intend Title VII to preclude employment discrimination claims under Title IX.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
DENNIS J. DIMSEY
MARIE K. MCELDERRY
Attorneys

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APPENDIX

1. Title IX of the Education Amendments of 1972, as codified at 20 U.S.C. 1681, provides, in relevant part:

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

20 U.S.C. 1681(a).

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, provides, in relevant part:

§ 2000e. Definitions

For the purposes of this subchapter--

* * * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year * * *.

42 U.S.C. 2000e(b).

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

> individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

42 U.S.C. 2000e-2(a).